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Supreme Court of the United States

OCTOBER TERM, 1943

No. 197

PHILIP SMOLOWE and M. WILLIAM LEVY, suing on behalf of themselves and as stockholders and for the benefit of all other stockholders of DELENDO CORPORATION similarly situated who may elect to come in and contribute to this action,

Respondents-Appellees,

against

DELENDO CORPORATION (formerly OLDETYME DISTILLERS CORPORATION), I. J. SESKIS and HENRY C. KAPLAN,

Defendants-Appellants.

UNITED STATES OF AMERICA,

Intervenor-Appellee.

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

JAY LEO ROTHSCHILD,
Solicitor for Petitioners.

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PETITIONERS' REPLY BRIEF

This brief is in reply to that submitted by the United States. We are informed that the respondents have not interposed an answering brief, but rest upon the opinion of the Circuit Court of Appeals.

In view of the fact that the application before the court is for certiorari—which, in the nature of things, presents quite a different question from that which would require decision if the merits of the appeal, which we ask leave to prosecute, were directly before the court for determination—we limit ourselves to pointing out the startling position which the Government has finally taken (in its

answering memorandum), as convincing proof that the appeal which we seek leave to prosecute, should be reviewed by this court.

We refer to the discussion at Page 13 of the Government's answering memorandum, in which—following the procedure indicated in the opinion of the Circuit Court of Appeals—the Government argues as if it were not only the privilege and function of the petitioners, but their duty, to suggest a working rule for computation of profits under § 16b of the Securities Exchange Act of 1934, in the absence of any statutory justification for the standard formulated by the Commission.

We never suggested any specific procedure for the measurement of profit. We rested on that enacted by the Congress. Our position was, and has consistently remained, that "profit" means profit, and that, when the Congress said it was the "profit" which should be taken from the individual defendants, nothing which failed to come within the definition of that term, could be deemed to be profit, when, in fact, it was not.

The absurd result which follows from disregard of the word "profit," as used in the statute, is well-illustrated by the Government's statement (Page 13 of its answering memorandum) that, "The language of the Act permits the matching of any purchase and any sale during the six-months' period * * *." If, by this, it is meant that either the Securities and Exchange Commission—or the courts, for that matter—may arbitrarily match unrelated sales and purchases, as they see fit, so as to produce the gravest penalty to the individual defendants, then, indeed, has the Congress abdicated its legislative function as to what shall be the penalty inflicted, and delegated that unrestrained and unguided prerogative to the whim of the Securities and Exchange Commission! We find nothing in the legislative history of the enactment (which the

Government has chosen to ignore) which justifies such distortion of the Congressional mandate. In fact, we find nothing but unmistakable proof to the contrary. There is no warrant for the government's conclusion, in view of the fact that the Congress expressly stated that it was "profit" which was to be taken; and "profit" contemplates, not the matching of *any* sale against *any* purchase, but—as the statute itself states—a sale and purchase with respect to the same stock transaction. Otherwise the word "profit" becomes a nullity. The word "any," even in its lexicographical meaning, permits of no such interpretation as that assigned to it, both by the Circuit Court of Appeals and, now, by the Government. The word is distributive in nature, which means, not that unrelated phases of different transactions may be matched, but that the related phases of any one item—and the related phases of every item—may be matched.

A careful study of the opinion of the Circuit Court of Appeals leaves us with the conviction that it does not correctly reflect either the intention of the Congress, or the plain phraseology which the Congress employed in enacting § 16b of the Securities Exchange Act of 1934.

CONCLUSION.

The application for certiorari should be granted.

Respectfully submitted,

JAY LEO ROTHSCHILD,
Solicitor for Petitioners.

September 1, 1943.